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90-639

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN C. REUSCH,
Petitioner,

vs.

SEABOARD SYSTEM RAILROAD COMPANY,
Respondent.

Petition for a Writ of Certiorari
To the United States Supreme Court
From a Decision of the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether the Federal Employers Liability Act requires expert testimony by an economist and vocational rehabilitationst before the Court can submit the issue of loss of earning capacity to a jury for monetary determination.

II

Whether the Federal Employers Liability Act precludes a Court from permitting attorneys representing a railroad defendant from commenting to a jury that the reason an injured employee has brought the cause of action in a particular venue is to obtain a finance advantage from the local jurors.

III

Whether the Federal Employers Liability Act permits a Court to instruct a jury that it must deduct State and Federal taxes from its verdict without evidence of the applicable tax rates.

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JURISDICTIONAL STATEMENT OF THE CASE

This action arose from an incident which occurred near Glidden, Kentucky on December 26, 1984. Reusch, a railroad trackman, allegedly tripped over tools on a railroad bus while working for the Respondent Railroad. Reusch filed suit for injuries against the Seaboard System Railroad Company pursuant to the Federal Employers Liability Act (FELA), 45 U.S.C. Section 51, et seq. charging the railroad with negligence and the failure of the railroad to provide him with a reasonably safe place to work. He further alleges he suffered a low back injury. Reusch's amended complaint included allegations that he sustained a loss of future wages and a loss of earning capacity.

The jury returned a verdict in favor of the Petitioner John C. Reusch and against the Defendant Seaboard System Railroad Company in the amount of $50,000. Reusch filed a motion for a new trial. The motion asserted among other allegations of error that the trial court erred in failing to instruct the jury that the plaintiff could recover for a loss of future earning capacity. It also asserted that the court erred in its instruction to the jury that the amount of any state and federal taxes should be deducted from past wages awarded. The motion also alleged that the court permitted the railroad to give prejudicial evidence and argument to the jury. The motion concluded with the allegation that the evidence, argument and instructions resulted in an inadequate damage verdict (C.R. Vol. 2, 349-351). The trial court did not set the Motion for New Trial for hearing and it was deemed denied by the passage of time.

Reusch filed an appeal to the Supreme Court of Alabama. The Supreme Court of Alabama affirmed the verdict by an opinion released on July 20, 1990. Reusch did not file a request for rehearing and the opinion is final. The opinion of the Supreme Court of Alabama is attached in the Appendix.

Jurisdiction of the Supreme Court of the United States is conferred by the Federal Employers Liability Act.

Federal Statutes Involved

United States Code Annotated, Title 45, Section 51

Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations,

shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

United States Code Annotated, Title 45, Section 56

Section 56. Actions; limitations, concurrent jurisdiction of court

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

STATEMENT OF FACTS

Occurrence

The Plaintiff John Reusch was born on March 10, 1948. He lives in Dry Ridge, Kentucky, a farming community 35 miles south of Cincinnati with a population of approximately 16,000 persons (R.T. 62). Upon graduation from high school in 1966 in the northern Kentucky area he attended several junior colleges for two years playing football and studying forestry and business. His grades were average (R.T. 63,64). After quitting college he worked as a clerk in a department store for less than a year counting inventory and filling and emptying boxes. He earned $3.00 to $3.50 per hour. The next two years he worked in a music store answering the telephone for orders and replacing stock in the shelves. He earned $3.50 to $4.00 per hour. He then attended automobile mechanic vocational school, without getting a certificate or a license. He worked the next year as a mechanic for a Volkswagen dealership. The physical activities required when he worked as a mechanic were lifting heavy objects and placing his body in awkward positions. He described the work as heavy work (R.T. 65-69).

In June 1974 he went to work for the Louisville and Nashville Railroad as a carman apprentice. A carman repairs railroad cars changing wheels, gears, axles, couplers, and brake systems. Reusch described the work as heavy and dirty work (R.T. 70-74). Before his accident on December 26, 1984 Reusch was furloughed periodically from his job in the northern Kentucky area and he worked in the Louisville and Loyall, Kentucky carshops as a carman. He was physically able to do all the work of a carman without restriction prior to his accident (R.T. 74-76).

On November 5, 1984 the railroad furloughed Reusch from his job as a carman in Loyall, Kentucky (R.T. 199). He applied for a job with the Maintenance of Way department of the defendant railroad as a trackman (R.T. 76, 77). His starting date as a trackman in Loyall was November 7, 1984 (T.R. 199).

The tasks performed by a trackman are to repair railroad tracks, move track ties and spread ballast. The tools used are heavy spike mauls and wrenches. The work is very heavy requiring bending over, lifting heavy weights, using shovels lifting and pulling ties (R.T. 143). He worked as a trackman performing these jobs without difficulty for approximately a month and one-half before his accident (R.T. 77, 78).

On December 26, 1984 Reusch reported to work in Loyall, Kentucky, between 7:00 and 8:00 A.M. His foreman Baker instructed the work crew to board a bus owned by the defendant railroad for transportation to Glidden, Kentucky. The bus was a modified school bus painted white with seats on either side of an aisle. The tools that the track crew were to use were placed in the aisle from the rear of the bus (R.T. 81, 147, 368). There was no place for the tools in the back of the bus (R.T. 147). The only place to place the tools was in the aisle (R.T. 148). Reusch took his lunch and rain gear on the bus with him. Upon arrival in Glidden, where the crew was replacing a switch, the crew removed some of the tools from the bus. He left his lunch and rain gear on the bus.

At 11:30 A.M. the foreman told the track crew to get their lunches and other personal items off the bus.

Reusch was looking for his lunch and raingear. As he walked down the aisle his right foot (R.T. 91) struck one of a number of tools in the middle of the aisle, causing him to fall to the floor landing on his right side. Reusch did not see the tools in the aisle prior to stumbling over them.

After Reusch fell to the floor of the bus Proffitt and Moses helped him up. A company truck took him to Doctor Howard in Harlan, Kentucky.

Medical

Immediately after the accident Reusch's back was hurting (R.T. 92). Doctor Howard said he had a pulled muscle and

prescribed Tylenol 3 and a muscle relaxer (R.T. 94). He placed him on light duty. The next morning his back and buttocks were hurting and he had a hard time getting out of bed. He went to work on December 27 and 28 at Loyall but was not required to work (R.T. 97). The following days were a weekend and holiday and he did not work. He bagan to have pain in his testicles and down his legs and returned to Doctor Howard who continued light duty (R.T. 100). When he returned to work after the New Year's holiday he was told that he had been "misplaced" and did not have a job (R.T. 99).

The pain continued and he saw Doctor George Schoedinger in St. Louis on January 17, 1985 upon the recommendation of his brother whom Doctor Schoedinger had treated (R.T. 100). Doctor Schoedinger took a history of his falling over tools on a bus landing on his right side with immediate back pain (R.T. 213). From his clinical evaluation the Doctor felt he had a ruptured lumbar disc and told him to remain off work (R.T. 216). His pains continued and his right leg started to drag (R.T. 103). He next saw Doctor Schoedinger on April 5, 1985. The doctor's examination revealed muscle spasm and a slightly depressed ankle jerk. X-rays were negative. An EMG was abnormal (R.T. 221-225).

On June 10, 1985 Doctor Schoedinger spoke to Reusch by telephone informing him of his test results. After being apprised of the risks involved Reusch told the Doctor he wanted something done (R.T. 104, 228-230). He was scheduled for hospitalization on July 12, 1985 in St. Anthony's Hospital in St. Louis (R.T. 228). A myelogram performed revealed bulging discs midline in the space between L-3 and L-4 and L-4 and L-5 (R.T. 233, 273). The Doctor performed a chemonucleolysis at the two lumbar disc spaces. The procedure is to insert a needle in the disc space. A material is injected into the space to dissolve the disc and cartilage (R.T. 244).

After the chemonucleolysis surgery he did not improve. Pain and numbness developed in his right leg from the knee to his

foot. He had a burning sensation in his buttocks. The procedure didn't work (R.T. 109, 110). Dr. Schoedinger testifed that 60 to 70 percent of patients improve after the procedure (R.T. 248). A subsequent CT scan revealed bulging discs at the spaces L-3 and L-4 and L-4 and L-5. Doctor Schoedinger rescheduled him for hospitalization in January 1986 (R.T. 249). The Doctor performed surgery on January 14, 1986 removing residual bulging discs at the disc spaces (R.T. 253-256). The last time Doctor Schoedinger examined him was on March 4, 1988. At that time he had pain in his buttocks radiating on the posterior surface of his thigh and calf on his left side. He had occasional cramping on his right calf. The Doctor discussed a fusion of the back with him to alleviate his pain but Reusch didn't want anything further done (R.T. 261). The reason for the fusion procedure would be to control pain and not to return Reusch to unrestricted industrial activity (R.T. 264). He stated that 80 percent of those patients having surgery resume most activity while 20 percent do not (R.T. 260). The prognosis for Reusch is continued difficulty. Whether he needs a fusion will depend on whether he can tolerate his symptoms (R.T. 262, 263).

In February 1989 Doctor Schoedinger authorized Reusch to attend a pain clinic in Cincinnati which he did (R.T. 113). At the time of trial he had been taking over the counter pain medicine 2 or 3 times per day averaging 3 days per week (R.T. 115).

Disability

Prior to Reusch's accident on December 26, 1984 he was an active person (R.T. 144). He played football as a tackle in college (R.T. 64). He was able to do the work of a mechanic and a railroad carman and trackman without any physical restrictions (R.T. 74-78). He could perform very heavy work (R.T. 74).

At the time of trial he couldn't lift and stretch (R.T. 123). Doctor Schoedinger testified Reusch couldn't go back to heavy

work (R.T. 259). He is inhibited in activities which put stress on his back such as sitting and driving, lifting, bending, pushing, pulling or any activity which increases the pressure in the disc or causes torquing motion on the back (R.T. 262, 263).

He can't do things that he did prior to this accident such as bowling, golf, water sking or playing with his children (R.T. 115). He tried to hunt and couldn't get out of bed the next day. He awakes with muscle spasms in his leg five out of seven days. He has good days and bad days. He is never without pain (R.T. 115).

Earnings and Earning Capacity

Doctor Howard placed Reusch on light duty the day of his accident (R.T. 97). The railroad retained him on light duty until after the New Year at which time he was told to go home and that he did not have a job (R.T. 99). He saw Doctor Schoedinger on January 7, 1985 who told him to remain off work (R.T. 216). He was never released by Doctor Schoedinger to return to railroad employment (R.T. 263), trackman work (R.T. 284) or heavy work (R.T. 259). He told Reusch that he should find some lighter employment to do (R.T. 259).

Reusch last worked for the railroad on December 28, 1984 and was not aware that December 28, 1984 was the last day on the job. He never received a five day termination notice (R.T. 142). The railroad had no record of him working (R.T. 406). He was not contacted by the railroad again until September 1988 when the railroad requested that he see Dr. Costen, a vocational rehabilitation consultant in Cincinnati (R.T. 126, 127, 204).

Reusch was not released to do any work by Doctor Schoedinger until 1987 (R.T. 122). In 1987 he drove a school bus for two months earning $10.00 per trip. He terminated his service as a bus driver after an incident when he had a leg cramp while driving the bus and was fearful for the safety of the children on the bus (R.T. 117, 118).

He operates a "pick your own" program selling raspberries and some vegetables which he grows on a couple of acres. He is able to pick some berries because the berry bushes are four to five feet tall (R.T. 118, 119). The program has been in existence only two years and it takes at least one year for the plants to mature for production (R.T. 119).

He has completed employment applications for Duro Bag Company as a fork lift driver. He revealed his back operation on the application. He did not have a response. He applied at the Rural County Electric Company as a meter reader. He revealed his back operation on the application. He did not receive a response. He applied to Kentucky Manpower Job Services for employment and again revealed his back condition. He had no response (R.T. 120-122).

In 1984 Reusch earned $30,000 working for the railroad. In 1980 he earned approximately $17,000 to $18,000. During the five years prior to 1984 he averaged $24,000 to $24,400 per year depending on overtime available (R.T. 125).

At the time of trial Reusch was of the opinion that he could do any work that wouldn't require extensive sitting, standing, stretching or general lifting of any heavy objects. He does not believe he could work as a mechanic because of the heavy lifting (R.T. 122, 123). He plans to seek that type of employment which his back will allow him to do (R.T. 195).

Final Argument

During final argument the following statements were made in the presence of the jury.

> *Mr. Stabler:* ". . . let's find an incident or an accident, find Doctor Schoedinger, go to Illinois and find him a lawyer, or let him find you, come to Birmingham, came to Birmingham. You know, it's kind of funny when he had his knee problem he went to Covington, Kentucky, where he lives. When he had his other operation, he went across the river to Cincinnati to be treated." (R.T. 493)

Mr. Stabler: "I want to ask you one other question: Mr. Reusch lives in northern Kentucky, and I assume it's a nice place. I assume it's got a nice courthouse. Why is he here?

Mr. William Schooley: Your Honor, I object to that. That's a legal question.

Mr. Stabler: I won't deny that he has a right to be here in terms of he can — of venue. But why is he here? What is there about this case that embarrasses him to go to his own courthouse? What embarrasses him so much he needs to travel to a city he has never laid eyes on. Well I am entitled to an opinion. This is argument and this is my opinion: My opinion is that he thinks the juries of Jefferson County will give him something that his own folks won't." (R.T. 499)

Court Instructions

At the conclusion of the evidence after both parties rested, but before final argument the following conversations were held outside the presence of the jury.

The Court: ". . . have you got some jury charges?

The Court: Everything I have suggested is in APJI." (R.T. 445).

Mr. Stabler: ". . . I believe we're entitled to a charge that there is no evidence of future impaired earning capacity in this case." (R.T. 446).

Mr. William Schooley: "What is the Court then going to submit to the jury as far as damages?

The Court: Loss of earnings, pain and suffering . . . disability . . ." (R.T. 453).

Mr. William Schooley: "The Court then, as I take it, would not allow me to argue the fact that he was making

$24,000 an average a year and that his prospects in the future are —

The Court: I think that's speculative." (R.T. 453).

The Court: "What I think we don't have is evidence as to the loss of future earning capacity." (R.T. 455).

At the conclusion of the final arguments the Court instructed the jury as follows:

"Now you cannot award damages to the plaintiff in this case for any future lost earnings or loss of earning capacity." (R.T. 521)

"Now I do further instruct you, Ladies and Gentlemen of the jury, that any sum payable to an employee for an injury covered by the Federal Employers Liability Act is not subject to income tax either State or Federal. And if you made an award for any past lost wages to the plaintiff, you should reduce that by the State or Federal taxes which the plaintiff is not required to pay." (R.T. 522).

The amended complaint filed by the plaintiff alleges the loss of future earning capacity and the loss of future earnings and prays for damages for those items (C.R. Vol. 2, p. 334-336).

At the conclusion of the instructions given to the jury by the court the following exceptions were made by plaintiff's attorneys:

Mr. William Schooley: "Okay. I would take exception to the instruction to the jury that they cannot award future loss of earnings or loss of earning capacity." (R.T. 526).

Mr. William Schooley: "I would like to take exception to Charge Number 23 . . . You know there's no evidence of what the State and Federal taxes are . . ." (R.T. 533).

At the conclusion of the evidence, the plaintiff introduced a Mortality Table into evidence as Plaintiff's Exhibit 17 (R.T. 4).

The Court refused Plaintiff's Exhibit 16 which is a section of the "Code of Alabama" setting forth the legal rate of interest in Alabama.

ARGUMENT

I

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT THE PLAINTIFF COULD NOT RECOVER DAMAGES FOR THE LOSS OF FUTURE EARNINGS AND THE LOSS OF EARNING CAPACITY.

A. The Proper Measure of Damages In a Federal Employer's Liability Case Must Be Determined According To General Principles of Law As Administered In the Federal Courts.

The question of the measure of damages and the applicable law is to be settled according to the principles of Federal Law. In *Chesapeake and Ohio Railway Company v. Kelly,* 241 U.S. 117 (1916), the Supreme Court of the United States stated:

> "But the question of proper measure of damages is separably connected with the right of action, and in cases arising under the Federal Employer's Liability act it must be settled according to general principles of law as administered in the Federal Court."

The United States Supreme Court again set forth the law concerning the measure of damages in *Norfolk and Western Railway v. Liepelt,* 100 S.Ct. 755 (1980) at page 757:

> "It has long been settled that questions concerning the measure of damages in a Federal Employer's Liability Act action are federal in nature."

B. Pursuant to the General Principles Of Federal Law In A Federal Employer's Liability Case The Jury May Determine Loss of Future Earning Capacity And Wages By Use of Fair and Reasonable Inferences From Competent Evidence And Without The Use Of Expert Vocational And Economics Testimony.

In *Wiles v. New York, Chicago and St. Louis Railroad Company,* 283 F.2d 328 (1969) the United States Court of Appeals considered the award of future loss of wages and loss of earning capacity in a Federal Employer's Liability Act case. The plaintiff brought an action for back injuries received when a jack slipped and threw him a distance. This incident caused serious injuries including a laminectomy.

The evidence concerning his disability and wage loss consisted of medical testimony that his back injury would mitigate against his finding a job in heavy industry. At the time of trial there was evidence that the plaintiff was working for the railroad as a car repairman at a larger salary than he was receiving at the time of his accident. There was no other expert testimony other than medical testimony. The jury returned a verdict for the plaintiff and by interrogatory awarded money for loss of future earning power. In sustaining the award of the jury the Court of Appeals said at page 322:

> ". . . The evidence that Wiles is employed by the Railroad at a larger salary than that which he was receiving when he was injured is a fact of the issue of damages which the jury was entitled to take into consideration as was the testimony that Wiles, with his present medical history, would have difficulty under the conditions of modern industry in obtaining gainful employment in heavy industry.
>
> . . . The fact that Wiles would be unlikely to leave the Railroad's employment and thereby lose his seniority rights was another significant factor to be weighed by the jury. All of the facts enumerated and others were before

> the jury and we cannot say that there was a significantly larger element of speculation in arriving at an estimate of Wiles' loss of furture earnings than there would be in any ordinary instance requiring an estimate of damages by a jury. Since none of us is capable of foreseeing the future with any substantial degree of certainty every estimate of damages must contain elements of speculation."

The United States Supreme Court in *Chesapeake and Ohio Railway Company v. Carnahan,* 241 U.S. 241 (1916) stated that if the evidence indicates that an injury will result in the loss of future earning power the jury should be so instructed. At page 244 the Court stated:

> "The principle is established that when the evidence in a case shows that there will be future effects from an injury an instruction which justifies an inclusion of them in an award of damages is not error."

In *Moore v. Chesapeake and Ohio Railway Company,* 493 F.Supp. 1252 (1980), the court recognized that even though it was true that no testimony expresed literally and by way of conclusory opinion, with reasonable medical certainty, that plaintiff's eventual future earning power could be diminished as a result of her injuries, a doctor's testimony constituted an adequate basis for the giving of an instruction for loss of potential earning power.

The case of *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983) is cited by the Alabama Supreme Court as authority that expert testimony of an economist and vocational rehabilitationist are necessary for consideration by a jury on the issues of loss of earning capacity and future lost wages. The case does not so hold. The Supreme Court of the United States stated on page 789:

> ". . . For our review of the foregoing cases leads us to draw three conclusions. First, by its very nature the calculation

> of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a "rough and ready" effort to put the plaintiff in the position he would have been in had he not been injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and unpredictability create a substantial risk that the damages award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others.
>
> These conclusions all counsel hesitation. Having surveyed the multitude of options available, we will do no more than is necessary to resolve the case before us. We limit our attention to suits under Section 5(b) of the Act, noting that Congress has provided generally for an award of damages but has not given specific guidance regarding how they are to be calculated. Within that narrow context, we shall define the general boundaries within which a particular award will be considered legally acceptable.

Reusch testified that before his accident he was able to perform the heavy work required of a mechanic, railroad carman and trackman. supra at p.2. After his accident and surgery he could not lift, stretch, push, pull or bend. Doctor Schoedinger testified that he could not go back to heavy work. He is inhibited in activities which put stress on his back. supra, at p. 9.

Doctor Schoedinger told him to remain off work on January 7, 1985. He was never released to go back to heavy work on or off the railroad. He attempted to work as a school bus driver earning $10.00 a trip, but was unable to perform the work safely. He submitted applications for work, revealing his prior back surgery, but never had a response. He operates a small vegetable and berry farm which was not in full production at the

time of trial. supra, at p.11. His earnings while working for the railroad prior to his accident averaged $24,000 per year. The year before the accident he earned $30,000. supra, p.12. Mortality tables were in evidence. The court refused evidence of the legal ratio of interest in Alabama.

The earnings of the plaintiff before and after his injury are evidence of a loss of earning capacity.

Reusch earned $30,000 in 1984. His average wages during the five years prior to his injuries were $24,000. His earnings since the accident have been minimal. This evidence is a reasonable inference of loss of earning capacity. Its validity is for the jury under proper instructions on the issue of the loss of future wages and the loss of future earning capacity.

The jury could reasonably infer from the evidence future lost wages and loss of earning capacity and the value thereof.

On the basis of the above evidence the trial court erred in submitting a charge to the jury that it cannot award the plaintiff damages for loss of future wages and loss of earning capacity. Jurors in the present era and in metropolitan areas have much common knowledge of employment conditions, of wage scales, interest rates and of the effects of back operations upon the employability of the injured party. Expert testimony is not always necessary to their assessment of future damages.

II.

THE COURT ERRED WHEN IT INSTRUCTED THE JURY THAT AN AWARD FOR PAST WAGES SHOULD BE REDUCED BY THE AMOUNT OF STATE OR FEDERAL INCOME TAXES

The plaintiff concedes that the Court correctly instructed the jury that any sum payable to an employee for an injury covered by the Federal Employers' Liability Act is not subject to income tax. However the instruction by the Court that any award for

past lost wages should be reduced by state or federal taxes that the plaintiff is not required to pay is error.

There is no evidence of the amount of state and federal taxes which the plaintiff might be required to pay. There is no evidence whether Kentucky, where the plaintiff lives, has a state income tax. This is left to speculation by the jury. There is no evidence of the federal income tax rates between 1985 and 1989 and any deductions to which the plaintiff might be entitled. The jury is left to speculate.

In *Deakle v. John E. Graham and Sons*, 756 F.2d 821 (1985) the plaintiff was injured while a captain of a vessel. He brought action pursuant to the maritime laws. With reference to the effect which income taxes would have upon any award of the jury for lost wages the court stated on page 830:

> "Finally the income taxes that the uninjured Deakle would have paid should be subtracted from each respective annual installment of his projected income. However, because the evidence introduced at trial did not establish how much in taxes the uninjured Deakle would have paid, we cannot adjust Deakle's projected salary installments in this manner."

III.

THE COURT ERRED WHEN IT PERMITTED COUNSEL FOR THE RAILROAD TO ARGUE TO THE JURY THE VENUE OF TRIAL IN BIRMINGHAM

The Supreme Court of Alabama ruled in *Brotherhood of Painters, Decorators and Paperhangers of America v. Trimm*, 207 Ala. 587, 93 So.533 (1922) that an argument before a jury referring to residency of a party and the venue of the trial is prejudicial error. Attorney for plaintiff in the case stated in argument at page 533:

> "You know that any member of this local union here would gladly pay this man, if they had charge of the disbursement of the money. Gentlemen, you are not rendering a verdict against the local union here, but these people up in Indiana."

Attorney for the Defendant requested the Court to instruct the jury that residence or locality had nothing to do with it. The Court responded that "This is a matter of argument."

The Supreme Court reversed holding that the injection of residence and locality into the case was prejudicial error. The court stated on page 533 and 544:

> "This was an illegitimate argument. The defendant is a nonresident corporation. It had the same rights in court in this case as if it had been a citizen of Alabama or a corporation of the state. Whether it was a resident or a nonresident should have no weight with a juror in rendering a verdict in this cause. It was calculated to prejudice the cause of the defendant with the jury. The court did not try to eradicate the attempted, intentional, or unintentional effort to inject prejudice against the cause of the defendant in the minds of the jury because it was a nonresident but approved of it before the jury by stating "that is a matter of argument." ... The argument was highly improper."

Mr. Stabler argued to the jury that the plaintiff, a Kentucky resident, hired an Illinois Lawyer, went to a St. Louis doctor and came to Birmingham to file suit. He then argued that his "opinion is that he (Reusch) thinks that the juries of Jefferson County will give him something that his own folks won't." at supra, p.15.

Plaintiff's attorney objected but the court was silent and Stabler continued. This is acceptance as correct by the jury. The argument is so prejudiced that the trial court cannot correct

the effect upon the jury by ruling or instruction. Plaintiff's attorney could not state any words which would remove the effect of the argument on the jury.

IV.

THE AWARD OF THE JURY OF DAMAGES IN THE AMOUNT OF $50,000 WAS INADEQUATE AND CONTRARY TO THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE

The facts of the accident are mainly undisputed by the testimony of the witnesses. Reusch testified that he entered the bus with Moses, Bacon and Proffitt. He did not see the tools on the floor because he was looking for his lunch and rain gear. His right foot struck railroad tools on the floor of the bus causing him to fall to the floor.

The verdict of the jury was for the plaintiff awarding damages in the amount of $50,000 The liability of the railroad is clear and largely undisputed by the evidence.

The evidence of damages sustained by Reusch supports a much larger verdict than $50,000. He was a 36-year old person at the time of his accident in December 1984 with a work history of heavy manual labor. supra, p.1. He was physically able to perform the work, supra, p.2, and had only treated twice with a chiropractor for his back several years before the accident. supra, p.13. He sought medical treatment immediately and consulted with Doctor Schoedinger within the month after the accident. Doctor Schoedinger performed two surgical procedures removing the disc spaces between L-3 and L-4 and L-4 and L-5. supra, 5-7. He suffered pain while being treated by Doctor Schoedinger and since being released from treatment has muscle spasm at night and is never without pain. supra, p.9.

During the year prior to his accident he earned $30,000 as an employee of the railroad. He averaged $24,000 per year in wages during the five year period from 1980 to 1984. His earn-

ings since the accident are minimal even though he has tried to obtain employment. supra, p.9-12. His past lost wages computed to the time of trial approximate $100,000. Without any consideration of future lost wages and loss of earning capacity the verdict is inadequate and contrary to the great weight and preponderance of the evidence.

The most logical explanation of the inadequate verdict is the failure of the court to instruct the jury that the plaintiff is entitled to receive damages for future lost wages and loss of earning capacity and the prejudicial evidence and argument presented to the jury by the railroad.

CONCLUSION

For the foregoing reasons appellant John C. Reusch respectfully requests the court to vacate the judgment of the trial court awarding the plaintiff damages in the amount of $50,000 and to remand the case to the Circuit Court of Jefferson County for a new trial.

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APPENDIX

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1990

88-1494

John C. Reusch

v.

Seaboard System Railroad

Appeal from Jefferson Circuit Court
(CV-88-1494)

ADAMS, JUSTICE.

John Reusch filed an action pursuant to the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 et seq., against Seaboard System Railroad ("Seaboard"), alleging both negligence and failure to provide a reasonably safe place to work. The jury returned a $50,000 verdict for Reusch, and the trial court entered judgment on the verdict. Reusch filed a motion for new trial, which the trial court did not rule upon and which was deemed denied by operation of law after 90 days, pursuant to Rule 59.1, A.R.Civ.P. Reusch appeals, arguing that the verdict is inadequate and that the trial court committed reversible error on various grounds. We affirm.

Reusch was employed by Seaboard. He primarily worked as a carman, repairing railroad cars. At the time of the accident, however, Reusch had been "furloughed" from his job as a carman and was working as a trackman, repairing railroad track, moving track ties, and spreading ballast.

On December 26, 1984, Reusch reported to work in Loyall, Kentucky, and his foreman instructed him to board a bus own-

ed by Seaboard for transportation to Glidden, Kentucky. The bus was a modified school bus with seats on either side of an aisle. When he arrived at Glidden, Reusch left his lunch and rain gear on the bus. At lunchtime, Reusch boarded the bus to retrieve his lunch and rain gear. He tripped over some tools that were in the aisle and fell to the floor, landing on his right side. After the fall, Reusch had a pain in his back.

Seaboard immediately sent Reusch to Dr. Smith Howard in Harlan, Kentucky; Dr. Howard treated Reusch and then released him. He returned to work that day and for the next two days, but Seaboard did not require him to work. After the New Year's holiday, Reusch was informed that he no longer had the trackman's job; Reusch had been aware, however, that that particular job was temporary.

Reusch was later examined by Dr. George Schoedinger III. Dr. Schoedinger treated Reusch for pain in his back and in his right leg. Reusch continued to complain of pain, and Dr. Schoedinger performed a chemonucleolysis on Reusch. Reusch, nevertheless, complained of back pain and of pain in both of his legs. Dr. Schoedinger performed surgery on Reusch, which according to Reusch, did not alleviate the pain. Dr. Walter Whitehurst, testifying for Seaboard, criticized Dr. Schoedinger's use of chemonucleolysis on Reusch.

Medical evidence presented at trial showed that all of Reusch's objective medical tests were negative with regard to his alleged injury. No nerve root impingement was found. Dr. Schoedinger's surgical notes do not indicate that the fragments left over from the disc he treated by a chemeopapain injection were indicative of a back problem.

Reusch makes two arguments that were not preserved for appellate review. Reusch filed a motion in limine, requesting that evidence of his receipt of public aid, his personal life, and his medical history prior to the accident not be presented to the jury. The record does not reflect the trial court's ruling on that

motion. Seaboard read Reusch's deposition into the trial record in front of the jury. The deposition contained Reusch's testimony concering his receipt of food stamps, his living arrangements with his girlfriend, who was helping pay his bills, and his prior medical history. Reusch argues that the trial court erred in admitting that testimony. He never objected to the introduction of that testimony, however, and accordingly, because there had been no ruling on the motion in limine either, the record contains no ruling by the trial court concerning the admissibility of the testimony that Reusch now challenges. Reusch's argument fails, because no adverse rulings are presented for review. *Beautilite Co. v. Anthony*, 554 So. 2d 946, 949 (Ala. 1989).

Reusch also argues that Seaboard's counsel improperly mentioned venue in closing arguments. Although Reusch objected to the comment, he did not obtain a ruling from the trial judge. Again, no adverse ruling is presented for review. *Beautilite Co.*, at 949.

Reusch contends that the trial court erred in giving two particular jury charges. In the first challenged jury charge, the trial court stated:

> "Now you cannot award damages to the plaintiff in this case for any future lost earnings or loss of earning capacity."

Even when an FELA action is brought in a state court, "questions concerning the measure of damages in an FELA action are federal in character." *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 (1980). Accordingly, we look to federal cases for guidance in FELA actions. The United States Supreme Court has set out guidelines for the calculation of damages for impaired earning capacity in FELA cases. The damages award must be based on the plaintiff's after-tax earnings. *Norfolk & Western Ry.*, at 493-94.

In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), the Supreme Court addressed the method to be used to calculate a damages award for lost future earnings. Pfeifer was injured in the course of his employment as a loading helper on a coal barge, and he brought an action pursuant to § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 904. The Court declined to adopt any specific mathematical formula as a method for calculating lost future earnings. The Court, however, did set forth general considerations for calculating and proving lost earnings:

> "[T]he first stage in calculating an appropriate award for lost earnings involves an estimate of what the lost stream of income would have been. The stream may be approximated as a series of after-tax payments, one in each year of the worker's expected remaining career."

462 U.S. at 536.

The next step in calculating the damages award is to discount the lost stream of income calculated above to present value:

> "The discount rate should be based on the rate of interest that would be earned on 'the best and safest investments.' ... [s]ince under *Norfolk & Western R. Co. v. Liepelt* [citation omitted] the lost stream of income should be estimated in after-tax terms, the discount rate should also represent the after-tax rate of return to the injured worker. Thus, although the notion of a damages award representing the value of a lost stream of earnings ... rests on some fairly sophisticated economic concepts, the two elements that determine its calculation can be stated fairly easily. They are (1) the amount that the employee would have earned during each year that he could have been expected to work after the injury; and (2) the appropriate discount rate, reflecting the safest available investment.
>
> "... The trier of fact should apply the discount rate to each of the estimated installments in the lost stream of in-

> come, and then add up the discounted installments to determine the total award."

462 U.S. at 537-38.

In *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983), the former Fifth Circuit Court of Appeals rendered an opinion, specifically addressing *Pfeifer*, that is binding on both the Fifth and Eleventh Circuits. *Culver*, at 123. *Culver* stated that the calculation of lost future earnings "involves four steps: estimating the loss of work life resulting from the injury ..., calculating the lost income stream, computing the total damage[s], and discounting that amount to its present value." 722 F.2d at 117. The Court then went further than the United States Supreme Court and held that "fact-finders in this Circuit must adjust damage[s] awards to account for inflation according to the below-market discount rate method." 722 F.2d at 122.

We have implicitly held that when a plaintiff meets the requirements of these federal cases, he is entitled to have his claim for loss of future earnings submitted to the jury. In *Illinois Central Gulf R.R. v. Russell*, 551 So. 2d 960 (Ala. 1989), an FELA case, the defendant railroad argued that the trial court had erred when it submitted the plaintiff's claim for loss of earning capacity to the jury. Affirming the trial court's judgment, this Court stated:

> "Russell called an economist as an expert witness. He stated that Russell's net loss of income from February 1985 to January 1987 was $50,397, after taxes and expenses. In calculating the amount of money that Russell will earn in the future (working full-time) he considered the amount of his annualized gross wages; his work life [expectancy] based on U. S. Department of Labor tables (18.3 years); a 2% real wage gain (the amount of wages exceeding inflation, using the consumer price index); and income taxes paid on future wages."

551 So. 2d at 963. Accordingly, we held that Russell had presented evidence as required by federal case law to sustain his claim.

Reusch offered evidence that he earned an average annual salary of $24,400 in the five years he had worked for the railroad preceding the accident. He testified that in 1984, the year of the accident, he had earned $30,000. He offered no other evidence in support of his claim for lost earnings. He offered no evidence of the economic value of his future employment, so there is no conclusive evidence of any lost stream of earnings. He did not offer any testimony or other evidence of the amount of income tax he was paying or the effect of taxation on any stream of earnings he might have had. Although Reusch did offer mortality tables, he did not offer evidence of his work life expectancy. Furthermore, Reusch did not offer evidence of the interest rate on the best and safest investments as well as an application of a discount rate to his alleged stream of earnings. Finally, Reusch offered no evidence of the effect of inflation on any stream of earnings he may have had. At most, Reusch produced only a portion of the evidence necessary to ascertain his stream of earnings. Under the applicable federal decisions, we must conclude that he did not produce the evidence necessary to sustain his claim for loss of future earnings. The trial court did not err by instructing the jury that it could not award Reusch damages for lost future earnings and loss of earning capacity.

Reusch further argues that the trial court erred when it gave the jury this charge:

> "And if you made an award for any past lost wages to the plaintiff, you should reduce that by the State or Federal taxes which the plaintiff is required to pay."

An award of damages in an FELA case is not subject to state or federal income tax. *Norfolk & Western Ry.*, supra; *Seaboard Coast Line R.R. v. Yow*, 384 So. 2d 13 (Ala. 1980). According-

ly, if, to prove his claim for lost past wages, Reusch had produced evidence of his before-tax income, then the charge arguably would not be error, because it would indicate that Reusch was to be compensated for loss of his after-tax earnings. On the other hand, if, to prove his claims for lost wages, Reusch had produced evidence of his after-tax income, then the charge might be error, because it might lead the jury to reduce the award, based on after-tax earnings, once again for taxes. The record does not indicate whether the figures that Reusch used to support his lost past wages claim are before-tax or after-tax figures. Without that evidence, we will not hold that the trial court erred.

Finally,Reusch contends that the jury verdict was inadequate and was contrary to the great weight and preponderance of the evidence. As the Court stated in *Brumley v. United American Insurance Co.*, 542 So. 2d 1231 (Ala. 1989):

> "Factual disputes are to be resolved by the trier of fact.... A jury's verdict is presumed correct and will not be disturbed unless plainly erroneous or manifestly unjust. This presumption of correctness is further strengthened when a motion for new trial is denied by the judge. *Pate v. Sunset Funeral Home*, 465 So. 2d 347 (Ala. 1984)."

542 So. 2d at 1233.

We have reviewed the record, and we do not find that the jury's verdict was either inadequate or against the weight and preponderance of the evidence. Reusch did present evidence that would have supported a larger verdict. However, the jury was also entitled to infer from all the evidence that Reusch failed to mitigate his damages and that he was not injured as severely as he claimed and to doubt his credibility as a witness.

The judgment is due to be affirmed.

AFFIRMED.

Hornsby, C. J., and Maddox, Almon, and Steagall, JJ., concur.